

STATE OF MICHIGAN

SUPREME COURT

STEPHEN W. WARDA,

Plaintiff-Appellee/
Cross-Appellant,

vs.

CITY COUNCIL OF THE CITY OF
FLUSHING and CITY OF FLUSHING,

Defendants-Appellants/
Cross-Appellees

SUPREME COURT NO. 125561

COURT OF APPEALS NO. 24118

Lower Court No. 98-62796-CZ
Judge Robert M. Ransom

THOMAS W. WAUN (P-34224)

Attorney for Plaintiff-Appellee/
Cross-Appellant
10683 S. Saginaw St., Ste. D
Grand Blanc, Michigan 48439
(810) 695-6100

EDWARD G. HENNEKE (P-14873)

Attorney for Defendants-Appellants/
Cross-Appellees
2222 S. Linden Road, Suite G
Flint, Michigan 48532
(810) 733-2050

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

LAW OFFICES
/ASCHA & WAUN, P.C.
0683 SOUTH SAGINAW ST.
SUITE D
GRAND BLANC, MI 48439
(810) 695-6100

FILED

DEC - 8 2004

CORBLIN, DAVID
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

Counter-Statement of Issues Involved.....	iii
Index of Authorities.....	iv
I. Introduction.....	1
II. Facts.....	2
III. Justiciability.....	3
A. Whether This Claim Is Justiciable Is Not A Jurisdictional Question And Therefore The Issue Should Have Been Raised On Appeal Previously And The Failure To Do So Constitutes A Waiver Of This Argument.....	3
B. The Political Question Doctrine Does Not Apply To The Actions Of The City Of Flushing In This Case And As Such, The Case Presented A Justiciable Claim.....	5
Conclusion.....	10

COUNTER-STATEMENT OF ISSUES INVOLVED

1. WHETHER THE FAILURE BY THE DEFENDANT TO RAISE THE POLITICAL QUESTION DOCTRINE AT ANY STAGE IN THIS LITIGATION CONSTITUTES A WAIVER OF THIS ISSUE ON AN APPEAL AT THE SUPREME COURT.

Plaintiff/Appellee Answers: Yes.

Defendant/Appellant Answers: No.

The Trial Court and Court of Appeals have not addressed this issue

2. WHETHER THE PRESENT CASE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

Plaintiff/Appellee Answers: No.

Defendant/Appellant Answers: Yes.

The Trial Court and Court of Appeals did not address this issue.

INDEX OF AUTHORITIES

<u>Atlee v. Laird</u> , 347 f. supp 689, 701 (e.d. Pa 1972).....	4
<u>Baker v. Carr</u> , 369 US 209 (1962).....	4
<u>Bendix Safety Restraints Group v. City of Troy</u> , 215 Mich App 289 (1996).....	1, 2, 5, 6, 8
<u>Booth Newspapers, Inc. v. University of Michigan Board of Regents</u> , 441 Mich 211, 235 (1993).....	3
<u>Bowens v. City of Pontiac</u> , 165 Mich App 416 (1987).....	1, 7, 10
<u>Butcher v. Department of Treasury</u> , 425 Mich 262 (1986).....	3
<u>City of Warren v. Dannis</u> , 136 Mich App 651 (1984).....	1, 7, 10
<u>Dagonhardt v. Special Machine & Engineering, Inc.</u> , 418 Mich 520 (1984).....	3
<u>Exeter Township Clerk v. Exeter Township</u> , 108 Mich App 262 (1981).....	1, 7, 9, 10
<u>Forfeiture of Property</u> , 441 Mich 77 (1992).....	3
<u>Fox v. Board of Regents</u> , 375 Mich 238 (1965).....	3, 4
<u>House Speaker v. Governor</u> , 443 Mich 560, 574 (1993).....	1, 5, 6
<u>In Re Estate of Frasier</u> , 288 Mich 392 (1939).....	3, 4
<u>Iwanowa v. Ford Motor Company</u> , 67 f. supp 424 at 483 (d.n.j. 1999).....	4
<u>Japan Whaling Association v. American Cetacean Society</u> , 478 US 221, 230 (1986).....	5
MCL 600.605.....	4
MCL 691.1401(b).....	7
MCL 691.1401(d).....	7
MCL 691.1408.....	5, 6, 9

MCL 691.1408(2).....	6
MCR 7.302(g)(1).....	1
<u>Messmore v. Kracht</u> , 172 Mich 120 (1912).....	1
<u>Ohio Department of Taxation v. Kleitch Brothers, Inc.</u> , 357 Mich 504 (1959).....	3
<u>Wayne County Sheriff v. Wayne County Board of Commissioners</u> , 196 Mich App 498 (1993).....	1, 7, 10

I. INTRODUCTION

This matter arises from Defendant's Application for Leave to Appeal the Judgment of the Court of Appeals dated December 23, 2003. This Court entered an Order on October 29, 2004, directing the clerk to schedule this matter for oral argument on whether to grant the Application or take other preemptory action permitted by MCR 7.302(g)(1).

In addition to directing the clerk to schedule this matter for oral argument, this Court directed the parties to file supplemental briefs. Specifically, the Court directed the parties to brief the issue of whether the City Council's decision in this matter was subject to judicial review. This Court cited House Speaker v. Governor, 443 Mich 560, 574 (1993), Messmore v. Kracht, 172 Mich 120 (1912) and the concurrence in Bendix Safety Restraints Group v. City of Troy, 215 Mich App 289 (1996).

The above cases address the issue of whether claims are justiciable under the Political Question Doctrine. If the Court does find that the Political Question Doctrine applies in this case and the claims are non-justiciable the Court will be overruling over two decades of well established Court of Appeals precedent. See Exeter Township Clerk v. Exeter Township, 108 Mich App 262 (1981); City of Warren v. Dannis, 136 Mich App 651 (1984); Bowens v. City of Pontiac, 165 Mich App 416 (1987); Wayne County Sheriff v. Wayne County Board of Commissioners, 196 Mich App 498 (1993).

II. FACTS

The underlying facts of this case as they pertain to this appeal are set forth fully in the Statement of Facts contained in Appellant's Application for Leave to Appeal as well as the Counter-Statement of Facts contained in Appellee's Response in Opposition to the Application for Leave to Appeal. Those facts will not be repeated in this brief.

Facts additionally important to the issue addressed in this supplemental brief pertain to the procedural history of the case. The Defendant/Appellant in this case is the City of Flushing. They are the legislative body that made the decision which was at issue in this case. At no time during any of these proceedings has the City of Flushing ever questioned whether this claim was judiciable under the Political Question Doctrine. At all times the City of Flushing has agreed to the jurisdiction of both the Trial Court and the Court of Appeals.

It is important and interesting to note that the Court of Appeals Opinion affirming the Trial Court in the present case issued on December 23, 2003, was authored by Judge O'Connell. Judge O'Connell is the same Judge who wrote the Opinion in the Bendix Safety Restraints Group v. City of Troy, Supra, which this Court cited when raising the issue of the Political Question Doctrine in the Order setting this matter for oral argument. Judge O'Connell at no time questioned the Court of Appeals authority to hear and decide this case as he obviously found this claim judiciable.

III. JUSTICIABILITY

A. Whether This Claim Is Justiciable Is Not A Jurisdictional Question And Therefore The Issue Should Have Been Raised On Appeal Previously And The Failure To Do So Constitutes A Waiver Of This Argument.

The first issue which should be addressed by the Court is whether the justiciability of this claim under the Political Question Doctrine is an issue. The issue has never been raised by any of the parties. As will be discussed below, the Political Question Doctrine is not jurisdictional. As such, Plaintiff/Appellee believes that this particular issue has been waived and should not be addressed for the first time at the Supreme Court level.

It has long been the law in this state that issues raised for the first time on appeal are not ordinarily subject to review. See Booth Newspapers, Inc. v. University of Michigan Board of Regents, 441 Mich 211, 235 (1993). As stated by the Court in Booth Newspapers at 441 Mich 235 fn 23:

“This Court has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims. In re Forfeiture of Property, 441 Mich 77 (1992); Butcher v. Department of Treasury, 425 Mich 262 (1986); Dagonhardt v. Special Machine & Engineering, Inc., 418 Mich 520 (1984); Ohio Department of Taxation v. Kleitch Brothers, Inc., 357 Mich 504 (1959).”

An exception to the above rule arises in cases involving the issue of whether subject matter jurisdiction existed in the first instance for a court to hear a case. See Fox v. Board of Regents, 375 Mich 238 (1965); finding that the Circuit Court does not have jurisdiction over claims against the state as such jurisdiction is statutorily granted to the Court of Claims; and In re Estate of

Frasier, 288 Mich 392 (1939); finding that a Probate Court does not have statutory subject matter over case involving the disposition of property.

The United States Supreme Court Decision in Baker v. Carr, 369 US 209 (1962) is the case most often cited in other cases dealing with the Political Question Doctrine. The Baker Court analyzed the Doctrine in the context of all the cases leading up to that point in time which led to its development.

A good synopsis of the Baker Decision as it pertains to jurisdiction is contained in Iwanowa v. Ford Motor Company, 67 f. supp 424 at 483 (D.N.J. 1999) where the Court stated:

“The Political Question Doctrine holds that a Federal Court having jurisdiction over a dispute should decline to adjudicate it on the grounds that the case raises questions which should be addressed by the political branches of government. See Baker v. Carr, 369 US 186, 210 (1962); Atlee v. Laird, 347 f. supp 689, 701 (e.d. Pa 1972) (Noting that ‘even though a dispute may constitutionally be subject to the judicial power, if a political question is present, the Federal Court should decline to address the merits’) ... “

The Circuit Court clearly has jurisdiction over damage claims by a police officer such as Stephen Warda against the City of Flushing pursuant to MCL600.605 and Article VI, Section 13 of the State Constitution. This is not a case in which the Court initially lacked the power to hear this claim on a jurisdictional basis. Thus the unusual measure of the Court raising this issue on its own motion for the first time is not supported by the authority set forth in Fox, Supra, and In re Frasier, Supra.

Justiciability of this claim is something that the Defendant should have raised early on in the litigation. The City of Flushing is a legislative body that, if

this claim were not justiciable, should have sought relief from the Trial Court and Court of Appeals. It is the legislative body that would be entitled to protection under the Political Question Doctrine (if it even applies). Their failure to raise this issue and preserve it on appeal should constitute a waiver of the issue.

B. The Political Question Doctrine Does Not Apply To The Actions Of The City Of Flushing In This Case And As Such, The Case Presented A Justiciable Claim.

This case involves a decision by the City of Flushing to refuse to pay one of its employees, police officer Stephen Warda, attorney fees resulting from his having to defend a criminal action which arose out of his employment with the City. The claim for payment of these fees was made pursuant to MCL 691.1408 and Officer Warda's employment relationship with the City. The City has discretion to pay those fees. The Trial Court and Court of Appeals in this case found that the City abused its discretion in denying payment of those fees.

The Political Question Doctrine has been described as follows by the United States Supreme Court in Japan Whaling Association v. American Cetacean Society, 478 US 221, 230 (1986) as follows:

"The Political Question Doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of congress or the confines of the executive branch."

The Political Question Doctrine has been adopted in Michigan and discussed in the cases cited by the Court in ordering the briefing of this issue of House Speaker, Supra, and the concurrence in Bendix, Supra. It is clear from

reviewing Federal case law on this issue as well as the two cited Michigan cases that not all decisions made by a legislative body are political questions which are nonjusticiable. See House Speaker, Supra, 443 Mich at 199.

Each case has to be looked at on a case by case basis. As stated by Judge O'Connell in his concurrence in Bendix, Supra, 215 Mich App at 294:

"The corollary of the separation of powers principal is the Political Question Doctrine, which requires analysis of three inquiries: (1) Does the issue involve resolution of questions committed by the text of the constitution to the legislative or executive branches of government? (2) Would resolution of the question demand that the court move beyond areas of judicial expertise? (3) Do considerations for maintaining comity between the coordinate branches of government counsel against judicial intervention? House Speaker v. Governor, 443 Mich 560, 574 (1993)."

When employing the above analysis, it's clear that this case does not involve a nonjusticiable political question.

The first inquiry is whether the question involved in this case was committed by the text of our State Constitution to the legislature. There is nothing in the text of our State Constitution which discusses the issue of payment of employment attorney fees arising out of a criminal action. The issue arises pursuant to state statute and the common law.

The text of MCL 691.1408 also supports this analysis. MCL 691.1408(2) states:

"(2) When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency may pay for, engage, or furnish the services of an attorney to advise

the officer or employee as to the action, and to appear for and represent the officer or employee in the action. ...”

The statute allows criminal fees to be paid for an officer or employee of “a governmental agency”. “Governmental agency” is defined as follows in MCL 691.1401(d):

“(d) “ ‘Governmental agency’ means a state or political subdivision”

“Political subdivision” is defined in MCL 691.1401(b) as follows:

(b) “ ‘Political subdivision’ means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of two or more of these acting jointly; a district or authority authorized by law or formed by one or more political subdivisions; or an agency, department, court, board, or counsel of a political subdivision.”

Clearly, the above statute applies to all three branches of government. Just as clearly, a decision whether or not to pay attorney fees under this statute is neither constitutionally nor statutorily reserved to any one of the three branches of government.

The second inquiry in analyzing the Political Question Doctrine is whether the questions demanded of the court in this case move beyond areas of judicial expertise. Nothing could be further from the truth. In this case the court is reviewing whether an abuse of discretion has occurred, an analysis often undertaken by courts. That question is clearly justiciable as specifically evidenced by Court of Appeals decisions over the past two decades dealing with the issues identical to those presented in this case. See Exeter, Supra; City of Warren, Supra; Bowens, Supra; and Wayne County Sheriff, Supra.

The last inquiry is whether prudential considerations for maintaining respect between the three branches of government counsel against judicial intervention. This clearly is a determination which has to be made by the Court. In making this determination, the Court has to keep in mind that the city council was not enacting legislation in making the decision in this case. The city council was not making some great policy choice or value determination. The city council was simply dealing with one of its employees in an employment related matter.

In this regard, there are strong policy considerations underlying the need for public officials and employees, such as police officers, to be able to perform their official functions without having to worry about potentially facing the prospect of costly attorney fees. To keep the courts involved in reviewing decisions that involve an abuse of discretion keeps the governmental agency making the decision honest and forces the agency to have legitimate reasons for denying payment of the fees. Additionally, it provides an avenue of review for those police officers and firefighters (and other public officials) who have been subject to denial of payment of attorney fees through the arbitrary and capricious actions of a governmental agency (in this case a city council) that has abused its discretion.

It's interesting to note that Judge O'Connell was both the author of the concurrence in Bendix, Supra, and also the author of the Court of Appeals Opinion in this case which affirmed Judge Corden at the Trial Court level. Judge

O'Connell reached a decision in this case and he clearly found the claims justiciable.

Under existing case law, the trial court had the power to hear this claim. As indicated above, a long line of cases beginning in 1981 clearly demonstrate that courts have authority over the factual situation identical to that presented to the Court in the present case. In Exeter, Supra, the issue was whether a township clerk could be reimbursed her attorney fees in having to defend a mandamus action arising out of her duties as clerk. The township denied payment of those fees and she sued the township. The Exeter Court stated at 108 Mich App 268-269:

"The following statutes, ...MCL Section 691.1408; ...are discretionary in nature and permit, rather than mandate, a township board to either hire a township attorney to represent the township entity as a whole or to pay for, engage, or furnish the services of an attorney to advise an officer charged criminally or sued in a civil action alleging negligence resulting in personal or property damage. There are no statutory guidelines demonstrating any legislative intent to answer the question of legal fee indemnification to reimbursement when a township clerk properly exercises a statutorily mandated function under the state election law. ...

Accordingly, a municipality such as a township in general possesses the discretion to determine whether (1) council for the township shall represent a township official sued in his or her capacity, (2) to approve retention of private council paid for by the township, (3) to indemnify the official for expenses incurred in defending the action, including attorney fees, or (4) the township board may decline to provide legal representation or indemnification for such official. The exercise of discretion by a municipality is generally reviewable by the courts for abuse of discretion... " (emphasis added).

The Exeter decision was followed in Warren, Supra; Bowens, Supra, and Wayne County Sheriff, Supra. Those cases also involved situations wherein the courts reviewed decisions by municipalities who refused to pay attorney fees requested by employees or officers. Despite the existence of these cases the legislature never sought to amend MCL 691.1408 to deprive the courts of their traditional function of reviewing these decisions to determine whether an abuse of discretion had occurred.

CONCLUSION

In conclusion, Plaintiff/Appellee believes that the arguments under the Political Question Doctrine potentially available to the Defendant/Appellant were waived when they were never raised on appeal. Even if the issues surrounding the Political Question Doctrine are properly before this Court, it is clear that the Doctrine should not apply. For the reasons cited in this brief, the claims are clearly justiciable and as such the courts do have power to hear these claims and the focus of this appeal should therefore be on the issues raised by Defendant/Appellant in the Application for Leave to Appeal and Plaintiff/Appellee's response to those issues set forth in the brief filed in opposition to Application for Leave to Appeal.

WASCHA & WAUN, P.C.

By: 

THOMAS W. WAUN (P-34224)
MICHAEL P. PARILLO (P-56615)
10683 S. Saginaw St., Ste. D
Grand Blanc, Michigan 48439
(810) 695-6100

Date: December 7, 2004